Information Commissioner's Office

Promoting public access to official information and protecting your personal information

Freedom of Information Act Awareness Guidance No. 12

When is information caught by the Freedom of Information Act?

The Information Commissioner's Office (ICO) has produced this guidance as part of a series of good practice guidance designed to aid understanding and application of the Freedom of Information Act 2000. The aim is to introduce some of the key concepts in the Act and to suggest the approaches that may be taken in response to information requests.

The guidance will be developed over time in the light of practical experience.

Awareness Guidance No 12 takes the form of FAQs on a range of questions relating to when information is caught by, and therefore subject to, the Freedom of Information Act.

1. What does the Act say?

The Freedom of Information Act provides the public with a general right of access to information held by public authorities.

a) Are you a public authority?

A public authority is defined as any body which under the FOI Act is:

(i) Listed in Schedule 1, or

(ii) Designated by order under section 5 (in the form of commencement orders, passed since the Act received royal assent), or

(iii) A publicly-owned company as defined by section 6

Public authorities include:

- Central Government Departments and Agencies
- Local Government
- Police

- NHS
- State schools, colleges and universities
- Publicly owned companies

b) How do you decide if information is held by a public authority or held on behalf of another body?

For the purposes of the Act, information is held by a public authority if:

(i) it is held by the authority, otherwise than on behalf of another person, or

(ii) it is held by another person on behalf of the authority.

2. Is all information which was created by a public authority subject to the Act?

Yes, provided that it either retains possession of that information, or the information has been provided to another public authority, or it is held on behalf of the originating public authority by a third party.

An example of where a third party might hold information on behalf of a public authority is a Parish Council whose records are held by the local District Authority. This information would still be held by the Parish Council for the purposes of the Act and the Parish Council would therefore have to deal with requests for this information according to the requirements of the Act.

3. If you are a public authority that holds records on behalf of another public authority, what are your obligations?

Examples of this include county councils holding records that belong to district councils and universities holding information on behalf of companies which they have established in order to commercially develop their research.

As this information belongs to a public authority and it will be subject to the provisions of the Act. However, you will not be required to provide this information in response to requests as it is the originating public authority that will "hold" it for the purposes of the Act. Instead, you should:

(i) Ask the applicant to re-direct their request to the originating public authority; or

(ii) Transfer the request to the originating authority; or

(iii) Deal with the request yourself, but consult with the originating authority, whose responsibility it is to make the disclosure decision, in case they believe that some/all of the information could be exempt from disclosure under the Act.

Note: There is a different definition of hold in the Environmental Information Regulations (EIRs) – see below.

4. Does information that is permanently transferred to a public authority come under the Act?

Yes. The ownership of this information now rests with the public authority to which it was transferred, which would therefore hold it for the purposes of the Act. The main examples of permanently transferred information would be items gifted to a public authority or given to it in lieu of tax. Such information would only be exempt if it fell within an exemption(s) provided by the Act.

5. Is information held by a public authority, when it has read-only access to it?

An example would be a central electronic repository containing information created by a number of public authorities. Each public authority would be able to access each other's information from it but on a read-only basis.

In this case, it is the public authority which created the information and provided it to the repository that holds it for the purposes of FOI. This means that if a public authority receives a request for information located in the repository that it has not created, it should at the very least refer the applicant to the authority that holds the information.

However, public authorities are under a duty to provide reasonable advice and assistance to applicants. If an authority is confident that the information requested and to which it has read-only access is not exempt, and it would be as easy to provide a copy of the information as to redirect the applicant, then it would be good practice to provide a copy.

6. What steps should a public authority take if it is unclear whether information is held?

As the Act is wholly retrospective, there may be occasions when a public authority is required to undertake a search in order to determine whether or not requested information is held. However an authority is relieved of the duty to inform an applicant whether information is held if the estimated time spent searching for the information would exceed the appropriate limit (*Mr P Quinn v The Information Commissioner*)

The Commissioner expects such a circumstance to arise infrequently, as authorities should have due regard to the *Section 46 Records Management Code of Practice* (Lord Chancellor's Code of Practice on the Management of Records). The Commissioner may issue a Practice Recommendation in cases where it is clear that an authority is failing to meet its obligations under the Code.

7. Are public records that have been transferred to a Public Record Office (or another place of deposit appointed by the Lord Chancellor) still held by the public authority?

No. These records would now be held by the Public Record Office. As such, if the public authority were to receive a request for a transferred record, the public authority would be under a duty to inform the applicant that it is no longer held by them and provide the applicant with the appropriate advice and assistance that would enable them to redirect their request as appropriate.

8. Does private information held on deposit come under the Act?

As the Act relates to information that is "held by a public authority", this means that in some circumstances the definition may extend to information loaned or donated from third parties who are not public authorities.

a) Circumstances where private information is caught by the Act

Although the Act does not cover privately held information, there will be many cases when privately owned information is held by a public authority for its own purposes.

For instance the Department for Work and Pensions will hold private information in connection with social security claims, while Public Record Offices and libraries may hold private information which has been loaned or donated to them if they consider that information to be of public interest. For example, an individual may donate his family archives to a library in order for them to be viewed by the public, either immediately or at some date in the future. A further example of private information that is caught by the Act is comments received by a public authority from a private individual that relates to a consultation exercise conducted by that public authority.

In these circumstances the public authority will have an interest in this information and will make disclosure decisions. This is because although ownership may still rest with the depositor, the public authority with whom the information has been deposited effectively controls the information and holds it in its own right. It will therefore be difficult to argue that the information is merely held on behalf of another person and consequently not held for the purposes of the public authority itself.

b) Circumstances where it may be unclear whether private information would be subject to the Act.

There is a possible further category of information, namely information being deposited subject to conditions. In such cases it will often be considered incorrect to disclose information if there was a clear risk that the owner would demand its return or if the depositor had a reasonable expectation that disclosure would not take place. In these circumstances, the public authority which receives the request should check with the depositor, or surviving relatives, who will be able to advise the authority as to their wishes and expectations.

Where the depositor of the information objects to its disclosure, it will usually be found that an exemption can be applied to it . Exemptions which could apply are:

- Information available by other means;
- Personal Information;
- Information provided in confidence;
- Prejudice to commercial interests;
- Prejudice to effective conduct of public affairs.

Furthermore, if the information is due for future publication (even at an unspecified date), there would be a good public interest argument to withhold its disclosure until that time if the owner or indeed other depositors would be likely to withdraw the information.

c) Circumstances where private information is not caught by the Act

There will be cases where such information is simply held on behalf of a third party, for example for preservation or security purposes. Perhaps the public authority may be holding the information as part of a service (whether for gain or otherwise) to the depositor. Although this information is in the possession of a public authority, it does not fall within the scope of the Act as the public authority has no interest in it.

Although such information is not caught by the Act, the public authority would still have to respond to requests for it in some form. This is because applicants can still make a request for this information and the public authority would still be under a duty to confirm or deny whether it holds the information. Although it

would be under no obligation to supply the information, it would have to provide the applicant with advice and assistance to enable them to redirect their application to the person or body to which the information belongs. This would apply regardless of whether the other body is public authority or whether the applicant will in fact stand a chance of obtaining that information.

d) How does Environmental Information differ in this context?

Environmental information falls within a separate access to information regime, under the Environmental Information Regulations (EIR).

The EIR relate to:

> "Information in the authority's possession and has been produced or received by the public authority; or is held by another person on behalf of the authority."

As such, all environmental information in the possession of a public authority would be covered by this legislation (subject to its exceptions), regardless of the reasons for its possession. However, the EIR contain an exception if disclosure would adversely affect the interests of the third party and the third party has not consented to disclosure.

9. Is non-official information in the possession of public authorities caught by the Act?

These communications would not be caught by FOI, provided that the information is not created by a member of staff in the course of their duties.

Examples of non-official information include:

a) Trade union communications

The trade union is a separate legal entity, and although it will represent the employees of a public authority, it does not have a role in respect of the functions of that public authority. The public authority has neither created this information nor does it retain the material for its own purposes. The public authority simply holds this information on behalf of, and as a service to, the trade union. As such, these communications would not be held for the purposes of Freedom of Information.

The only kind of trade union information that would be caught by the Act is that which is held by the public authority for the purposes of its official dealings with the trade union, and therefore held for the purposes of its functions as a public authority. Examples include minutes of joint meetings between management and the union and a public authority's trade union recognition agreement. Copies of such information in the possession of the trade union itself would not be subject to FOI, unless they were being held on behalf of the public authority.

b) Personal written communications (emails, etc)

In most circumstances private emails sent or received by staff in the workplace would not be held by the authority as it has no interest in them. It will be a question of fact and degree whether a public authority does hold them, dependent on the level of access and control it has over the e mail system and on the computer use policies. It is likely to be the exception rather than the rule that the public authority does hold them.

Problems can arise with hybrid emails, those which contain a mixture of personal content and that relating to the duties of the employee. The information which falls within the latter classification is potentially disclosable, and so as part of good email management the formulation of such emails should be avoided.

(Further guidance on developing a policy for managing email is available from The National Archives: http://www.nationalarchives.gov.uk.)

c) Party political communications

A common example of party political communications would be emails between councillors which discuss party political matters. In this context the author will be communicating in their party political capacity and the emails would not relate to the functions of the public authority. Subject to the qualification mentioned before, these communications would not normally be held for the purposes of FOI.